

No. 7841

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

4

UNITED STATES OF AMERICA,

Appellant,

vs.

GLENN PERKINS

Appellee.

Transcript of the Record

Upon Appeal from the District Court of the United
States for the District of Idaho,
Eastern Division.

OSTER PRINTING CO., BOISE, IDAHO

APR 19 1935

PAUL F. O'BRIEN,

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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U. S. District Attorney.

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IN THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF
IDAHO, EASTERN DIVISION.

GLENN PERKINS

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 851

COMPLAINT

Filed April 5, 1932

Comes now the plaintiff in the above entitled action and complaining of the defendant alleges as follows, to-wit:

I.

The plaintiff herein is now a resident and citizen of Dayton, County of Franklin, State of Idaho, which is within the Eastern Division of the United States District Court of Idaho.

II.

That on the 9th day of August, 1917, said plaintiff enlisted for military service in the United States Marine Corps and served as a member of said United States

Marine Corps continuously thereafter until he was honorably discharged from said United States Marine Corps on the 17th day of June, 1919.

III.

That while in the United States Marine Corps and during the period between his said enlistment and his said honorable discharge as mentioned in the preceding paragraph of this complaint, desiring to be insured against the risks of war hazard, he applied for a policy of War Risk Insurance in the sum of Ten Thousand and no/100 (\$10,000.00) Dollars, and at the time of said application authorized the deduction from his service pay for all premiums that might become due for the said insurance, and said premiums were thereafter deducted from his said monthly service pay.

IV.

That a certificate of War Risk Insurance was duly issued by the defendant to this plaintiff and by the terms thereof this defendant agreed to pay to this plaintiff Fifty-seven and 50/100 (\$57.50) Dollars per month in the event of this plaintiff's suffering total and permanent disability, and that premiums were paid on said contract in accordance with the authority given as set forth in Paragraph III hereof, until the 30th day of June, 1919. And that said contract of War Risk Insurance was duly issued and premiums were paid thereon and said contract was in full force and effect at the time of this plaintiff's discharge from the military service as aforesaid.

V.

That while this plaintiff was in the military service of the United States as aforesaid, and while said contract of insurance was in full force and effect, this plaintiff did contract

Neurasthenia
Gunshot wound left hand, foot, and leg
Arthritis
Pyelitis with cystitis
Heart trouble
Gas infection of lungs
Nephritis
Enteroptosis
Hyperopia
Pharyngitis, chronic

and that this plaintiff has continuously from the time said insurance was in full force and effect to the present date, suffered as a result of said

Neurasthenia
Gunshot wound left hand, foot, and leg
Arthritis
Pyelitis with cystitis
Heart trouble
Gas infection of lungs
Nephritis
Enteroptosis
Hyperopia
Pharyngitis, chronic

and that this plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that as a result thereof the said plaintiff was at the time of his said discharge from said military service which was at a time that the said contract of insurance was in full force and effect, totally and permanently disabled, and has been so totally and permanently disabled from that time to the present date and that he will never be able to follow continuously a substantially gainful occupation; that by reason thereof he became entitled to receive from the defendant, the said sum of Fifty-seven and 50/100 (\$57.50) Dollars per month from the date of his discharge from the United States Marine Corps, to wit: the 17th day of June, 1919.

VI.

That the plaintiff has made application in writing to the defendant through its Veterans Administration, its Veterans Bureau, and the Director thereof, for the payment of said insurance benefits making his claim therefor on or about the 26th day of June, 1931. That the said defendant through said Veterans Administration and the Director of said Veterans Bureau has failed, neglected, and refused to pay to this plaintiff, said insurance or any part thereof, but claims and contends that the plaintiff has no right to the said payments or the payment thereof, and that on or about the 1st of April, 1932, this plaintiff received from the Veterans Administration

and the Director of said Veterans Bureau, notice that there exists a disagreement as contemplated within the provisions of Section 19 of the World War Veterans Act as amended July 3, 1930. And that there is now such a disagreement as required by Section 445 Title 38, U. S. C. A. and such a disagreement does now exist between this plaintiff and this defendant.

VII.

That this action is filed after July 3, 1931, but within the period of time thereafter less than the period elapsing between the filing in the said Bureau of the claim here sued upon and the denial of said claim by the aforementioned Director and within the time as required by said World War Veterans Act.

WHEREFORE, Plaintiff demands judgment against this defendant in the sum of Fifty-seven and 50/100 (\$57.50) Dollars per month from the 17th day of June, 1919, together with interest thereon and his costs and disbursements herein incurred, and attorneys fees as provided by law and as in the judgment of this court may be deemed just and reasonable, and that the Court determine what is a reasonable fee to be allowed to plaintiff's attorneys and direct the payment of said fees to plaintiff's attorneys.

B. W. OPPENHEIM,
J. M. LAMPERT
J. B. MUSSER,

Attorneys for plaintiff.
Residence: Boise, Idaho.

(Duly verified)

(Title of Court and Cause.)

ANSWER

Filed January 11, 1933

Comes now the defendant in the above entitled action, and answering plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

Answering Paragraph I. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

II.

Answering Paragraph II. of plaintiff's Complaint, this defendant denies each and every allegation contained therein; in this connection, however, it is admitted that the plaintiff entered the military service of the United States on August 9, 1917, and was honorably discharged therefrom on June 20, 1919.

III.

Answering Paragraph III. of plaintiff's Complaint, this defendant admits the allegations contained therein.

IV.

Answering Paragraph IV. of plaintiff's Complaint this defendant denies each and every allegation contain-

ed therein; in this connection, however, it is admitted that a certificate of war risk term insurance was duly issued by the defendant to the plaintiff by the terms whereof the defendant agreed to pay the plaintiff \$57.50 per month in the event that he suffered total and permanent disability while said contract of insurance was in full force and effect; it is further admitted that premiums were paid on plaintiff's policy to include the month of December, 1919.

V.

Answering Paragraph V. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

VI.

Answering Paragraph VI. of plaintiff's Complaint, this defendant denies each and every allegation contained therein, except insofar as said paragraph alleges that a disagreement exists between the plaintiff and the defendant; and in this connection it is admitted that a disagreement exists between the plaintiff and the defendant.

VII.

Answering Paragraph VII. of plaintiff's Complaint, this defendant admits the allegations contained therein.

WHEREFORE, having fully answered plaintiff's

Complaint, defendant prays that said Complaint be dismissed, and that plaintiff take nothing thereby, and that defendant have judgment for its costs.

H. E. RAY,
United States Attorney
for the District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney
for the District of Idaho.

Attorneys for the Defendant.

(Duly verified)

(Title of Court and Cause)

AMENDMENT TO ANSWER

Filed February 1, 1933

Comes now the defendant in the above entitled cause, leave of Court being first had and obtained, and amends Paragraph VI. of defendant's Answer to read as follows, to wit:

VI.

Answering Paragraph VI. of plaintiff's Complaint, this defendant denies each and every allegation contained therein.

H. E. RAY,
United States Attorney
for the District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney
for the District of Idaho.

Attorneys for the Defendant.

Leave of Court to file the foregoing Amendment granted.

CHARLES C. CAVANAH.
District Judge.

(Title of Court and Cause.)

COURT MINUTES

October 18, 1934

This cause came on for trial before the Court and a jury, Messrs. J. M. Lampert and J. B. Musser, appearing for the plaintiff, and Frank Griffin, Assistant District Attorney, and A. L. Freehafer, Attorney for the Department of Justice, appearing for the United States.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury. I. T. Reese, whose name was so drawn, was excused for cause; and Theodore Dance, Parley Lloyd, and Arthur Winters, whose names were also drawn, were excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause, and a true verdict render, to-wit:

Arley Dewey, Merrill D. Skinner, J. E. Fox, Max Chambers, Luke Dayton, J. L. Seedal, W. W. Tingey, K. M. Parkin, A. W. Jensen, C. F. Potter, A. T. Matthews and E. J. Kidd.

A stipulation of certain facts was presented and filed, after which, a statement of the plaintiff's case was made by his counsel to the jury. It was ordered that both sides have exceptions to all adverse rulings of the Court. The deposition of Dr. Curtis Bland was read in evidence on the part of the plaintiff.

After admonishing the jury, the Court excused them to nine-thirty o'clock A. M. on Friday, October 19, 1934, and continued the Trial to that time.

(Title of Court and Cause.)

COURT MINUTES

October 19, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

The reading of the deposition of Dr. Curtis Bland was resumed and concluded and Bernard C. Perkins, Loren Mendenhall, Mary Perkins, M. L. Jensen, Willis Mendenhall, Mrs. Glenn Perkins and Glenn Perkins were sworn and examined as witnesses and other evidence was introduced on the part of the plaintiff.

After admonishing the jury, the Court excused them to nine-thirty o'clock A. M. on Saturday, October 20, 1934, and continued the trial to that time.

(Title of Court and Cause.)

COURT MINUTES

October 20, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Glenn Perkins was recalled and further examined. Dr. Ellis M. Kackley and Dr. A. R. Cutler were sworn and examined as witnesses on the part of the plaintiff and here the plaintiff rests.

The deposition of Dr. G. E. Riggs, Dr. L. R. Quilliam and Dr. C. H. Sprague were read in evidence and Dr. P. J. Germon and Dr. H. E. Traubau were sworn and examined as witnesses on the part of the United States

and other evidence was introduced on the part of the defendant and here the defendant rests and both sides close.

The Government's counsel moved the Court to direct the jury to return a verdict in favor of the defendant. After hearing counsel on the motion the Court denied the same. The defendant was granted exceptions to the order.

After admonishing the jury the Court excused them to nine-thirty o'clock A. M. on Monday, October 22, 1934, and continued the trial to that time.

(Title of Court and Cause.)

COURT MINUTES

October 22, 1934

The trial of this case was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Counsel for the Government moved the Court for a dismissal of the action which motion was denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict.

While the jury was still out, the Marshal was directed to provide them with lunch and dinner at the expense of the United States.

The jury was instructed in case of their agreement to seal the verdict and to return the same into court at nine-thirty o'clock A. M. on Tuesday, October 23, 1934, and the bailiff was directed to permit the jurors to disband upon their arrival at a verdict.

(Title of Court and Cause)

COURT MINUTES

October 23, 1934

Counsel for the respective parties being present, the Jury returned in court, it being agreed that the members thereof were all present whereupon, the jury, through their foreman presented their written and sealed verdict, which was in the words following, to-wit:

(Title of Court and Cause.)

VERDICT

“We, the Jury in the above-entitled case, find for the plaintiff and fix the date of the beginning of his permanent and total disability from June 17th, 1919.

A. W. JENSEN, Foreman.”

The verdict was recorded in the presence of the jury, read to them and they each confirmed the same.

It is ordered that the defendant have sixty days from this date in which to prepare, serve and lodge proposed bill of exceptions in the above-entitled case.

It is further ordered that the October Term, 1934, of this Court be, and the same hereby is extended for the period of ninety days for all purposes in respect to the preparing, submitting, lodging and settlement of bill of exceptions.

(Title of Court and Cause.)

VERDICT

Filed October 23, 1934

We, the Jury in the above-entitled case, find for the plaintiff and fix the date of the beginning of his permanent and total disability from June 17th, 1919.

A. W. JENSEN. Foreman.

(Title of Court and Cause.)

JUDGMENT ON VERDICT

Filed October 24, 1934

This cause having come on regularly for hearing before the above entitled court in the court room thereof

at Pocatello, Idaho, upon the 18th day of October, 1934, J. M. Lampert, Esq., of the firm of Oppenheim and Lampert and J. B. Musser, Esq., appearing for and representing the plaintiff throughout said hearing, and Frank Griffin, Assistant United States Attorney for the District of Idaho, and A. L. Frechafer, Esq., Attorney, United States Department of Justice, appearing for and representing the defendant throughout said hearing, a jury was duly impanelled and sworn, and evidence both oral and documentary introduced, and arguments made by respective counsel, and the jury duly instructed by the Court, and the cause submitted to the jury.

Whereupon, upon the 23rd day of October, 1934, the said jury returned into open court with its verdict wherein it found:

“We, the Jury in the above-entitled case, find for the plaintiff and fix the date of the beginning of his permanent and total disability from June 17th, 1919.

A. W. JENSEN, Foreman.”

Wherefore, by reason of said verdict and the law applicable thereto, the court thereby finds that the plaintiff herein became totally and permanently disabled on the 17th day of June, 1919, and has been since said date and now is totally and permanently disabled, and that the said war risk insurance described in the complaint is in full force and effect.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant herein 184 monthly installments of \$57.50 each, or the total sum of \$10,580.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that ten per cent of all sums to be paid pursuant to this judgment is hereby fixed as a reasonable attorney's fee to be allowed to J. M. Lampert and J. B. Musser, as attorneys for the said plaintiff, the same to be paid to said J. M. Lampert and J. B. Musser by the Veterans Administration of the United States, or the Agency having charge of the payment of the same, out of any and all payments to be made to the said Glenn Perkins, or to his estate, or to the beneficiary or beneficiaries under said insurance policy, the same to be apportioned to them as follows:

Five per cent to J. M. Lampert at Boise, Idaho,

Five per cent to J. B. Musser at Boise, Idaho.

Dated at Pocatello, Idaho, this 24th day of October,
1934.

CHARLES C. CAVANAH,

District Judge.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

Lodged March 28, 1935

Filed April 2, 1935

BE IT REMEMBERED, that the above entitled case came on for hearing before the Honorable Charles C. Cavanah, District Judge for said district, with a jury, at Pocatello, Idaho, on the 18th day of October, 1934, at the hour of eleven o'clock A. M., on the issues joined by plaintiff's complaint and the answer and amendment to answer of the defendant, J. M. Lampert, of Oppenheim & Lampert, and J. B. Musser, both of Boise, Idaho, appearing for plaintiff, and Frank Griffin, Assistant United States Attorney for the District of Idaho, and A. L. Freehafer, Attorney, Department of Justice, both of Boise, Idaho, appearing on behalf of defendant, at which time and thereafter up to and including the 23rd day of October, 1934, when the verdict of the jury was returned, filed and entered, and to October 24, 1934, when the judgment on verdict was rendered, entered and filed herein, and after the empaneling of the jury and the opening statement of counsel for the plaintiff, the following proceedings were had: in respect of the assignment of error herein,—

MR. LAMPERT: I will ask you, Doctor Cutler, to step forward, as I am about to present the hypothetical

question. I would like to have you be seated inside the railing there where you can hear this question. It is the Court's desire, and it is the practice, that we propound the hypothetical question to the witness and to the other physicians at the same time to avoid repetition.

Q. Doctor, in addition to your findings and diagnosis, and the definition for total and permanent disability which I have given you, I will ask you to assume these facts, and wipe out from your mind any other facts than those I am now presenting to you in this assumed question,—I mean by that, other than your own findings and diagnosis: That this plaintiff had an education of two years in the high school,—was in his second year when stopping his education; that he was a farmer through training and occupation throughout life, had no other avocation or training other than that after the war, and that from about January 15th, 1921, to September, 1923, he was under instructions from the University of Idaho at Moscow for the period from January 15th, 1921 to about March 1st, 1921 in the forestry work, and from that period on to about September 1923 under training for agricultural pursuits on placement training, placed upon a ranch where he worked under supervision from about March 1st, 1922 to September 30th, 1923,—that he entered the military service on the ninth of August, 1917 entered the Marine Corps, and served there in that service until he was honorably discharged on the 20th day of June, 1919, save and except that on Novem-

ber 1st, 1918, he received wounds while engaged in battle in the Argonne, as a result of which he was taken first to the field hospital, then the Red Cross Hospital, and then the Base Hospital, finally on to Brest, and transferred to the United States as a casual in March to Quantico, Virginia, and continuing as a casual he was finally sent back home on a furlough, arriving at his home near Pocatello, Idaho, on or about May 1st, 1919, remaining there until the formal discharge was issued to him at Salt Lake City on June 20th, 1919; that during this period of his military service he arrived in France on or about March 5th, 1918, and within three weeks began engagements in active warfare, continuing for about a week, and then was in training, finally landing in the permanent active front line warfare on or about June 1st, 1918, being at the Chateau-Thierry, Soissons, Toul, Champagne, and Argonne sectors; that during that time he inhaled gas, one time to the extent that he was caused to vomit, and vomited in the gas mask; that he received burns, gas burning in several of these engagements, and that these body burns continued with him to the present time, and have throughout the years; that the inhaling of the gas caused burning sensations in his throat; that he was forty-six days under what he termed constant battle line work on one occasion, although he would have hours of rest at times, digging into holes in the trenches, that he had during that period of time gone as long as,—well, he only had one change of clothes during that period of

time, his clothes being wet much of the time, he being in water, standing in water much of the time; that during that period from about the first of June to the first of November, 1918, he was under much heavy shell fire, and a major portion of the time he was irregular with his meals, many days only receiving one meal; that on occasions he was without water for a considerable period of time, so that he became thirsty enough to on one occasion, at least,—yes, on two occasions to drink warm water from the cooling system of the German machine guns as they marched on into the German territory; that during the Chateau-Thierry engagement he was struck on the head with a flying object and became unconscious; that the injury I referred to as occurring on November 1st, 1918, was a shrapnel wound in the left foot, also in the left hand and left leg. He was not treated at the time for the left leg wound other than his own attention; the left hand wound was treated by a German prisoner on the way back to the hospital, and later treated in the hospital; the left foot was not given treatment at the time although it was sore and swollen from the injury, and its first treatment was by a Doctor Sprague in Pocatello on or about January, 1920, who then operated upon it; that the gas burns or sores are the most noticeable on the chest, legs, face and neck; that while at the San Mihiel front, which was in September in 1918 he first had a lame, sore back, which has continued from that time until the present; that again in October at the Cham-

pagne front while urinating he experienced a hurting and burning sensation; that he found his urine was bloody, of a bloody color, and that hurting and burning sensation and the bloody color continued for a couple of days; that again in the base hospital,—after November 1st, 1918 when he was taken back to the base hospital he was bothered in the same way, and had the same pains and suffering and the lame back and hips, and the smarting and burning while urinating, and that these pains and this suffering has continued to date, not to the same degree of severity each and every day, but constantly with him in some degree; that the urine was some times thick, not always bloody; that during the period of that warfare while wet and cold he had dull pains and aches and his arms became stiff, and that he still has dull pains and aches in his arms and shoulders, and that after he came to his home, within two or three days after his arrival, his mother's attention being attracted by his complaint of pains in the back, she applied mustard plasters; that from that time to the present he has had frequent applications of mustard plasters, rubbing with turpentine, and massaging on his back by his mother, brother, or wife; that that has not been daily, but very frequently throughout the period of time, and that he also in 1919 upon the recommendation of a doctor at Preston he had and made use of what he termed a Johnson & Johnson kidney plaster, and they have been applied constantly from that time to this; that after he arrived home he had a yellow

complexion, was thin, sunken cheeks, moved slowly, was nervous, would lie down and get up and move around in conversation; that in the month of June, 1919, he had what he termed a bad spell lasting for a couple of hours, having severe pains in the back, and in connection with the passage of urine; that during this period it was observed that he was bothered at night with getting up frequently and urinating, and that his urine was bloody and was stringy and pus-like, and this condition continued frequently from that time to the present; that the first week of July, 1919, he was given treatment for pyelitis, cystitis and neurasthenia by a medical official of this state who at that time found him under-weight, anaemic, tired, and exhausted, that he would get up in the morning still tired, suffered from a kidney difficulty and pain in the back and tenderness and pain extending into the groin, an irritability of the bladder and frequent urination, and more or less discomfort at the time of urinating that this pain, appearance, condition, pains and suffering that I have related as occurring on those occasions have continued throughout to the present time; that he has been treated, examined and given treatment by Doctor Bland, Doctor Cutler, Doctor States, Doctor Kackley, Doctor Sprague, Doctor Milford of his own choosing, and in addition thereto has made trips to the Veterans Hospital at Boise, where he has been under examination in 1923, 1924, 1926, in 1929, 1930 and 1932; that in addition to that while at the University he re-

ceived treatment by a Government doctor and for the same ailments, pain and suffering; that while there he was also sent for examination to a representative of the Government, a physician for the Veterans Bureau, or Public Health Service, in Spokane, that being in 1921, both of those instances; that on his arrival home he did no work during the months of May, June and July, remaining at his father's and mother's home near Pocatello; that following that he had approximately two months employment with the Forestry Department, receiving for his services there four dollars per day, that working consisting first of two weeks waiting orders at Hailey, Idaho, and then the balance of the time as an assistant on a truck in connection with fire-fighting service up in the Salmon River country; that he came back from that service about October 1st, 1919, and then again remained around his home without any work, other than occasionally going over to the dairy herd,—dairy farm his father was operating, and at times aiding in the milking and the chores, that continuing until about January 15th, 1921; that thereafter he attended the University under the training I have heretofore referred to for forestry work, and later in placement training from February, 1921,—February, 1922 until about September, 1923, during which time he, in addition to the studies at the University which consisted of going to the University at about nine o'clock in the morning, remaining some days until twelve, other days maybe one hour or

two hours in the afternoon, never more than three hours in the afternoon, and that he missed a few days in addition to those afternoons that I have referred to, otherwise taking quite regularly that course; that after he came back to the placement training,—that was upon the farm adjacent to the town of Dayton, where he had in connection with his operations two farms, one consisting of approximately eighty-four acres, which was in his name and owned by him, subject to a mortgage, which he had acquired before the war, and which he lost by reason of the mortgage foreclosure on or about 1925 in the month of June, and in addition to that he had there two hundred and sixty acres, approximately, consisting of about fifteen acres of irrigated land, the balance dry farm, mostly in wheat, some in pasture; that during the time that he was there upon that farm between the months of November, 1922, and September, 1923, he made reports as to his activities there, which include among other things the following: That he reported as to a total of 1158 hours up to March 24th, 1923, that being the winter season covering the first winter of 1922-1923, out of which time 570½ hours were devoted to doing chores, the chores consisting of milking from three to five cows daily, taking care of the stables, one team of horses, five young pigs, and nine chickens; that in addition to that he occasionally fed some other stock which was running out on the range, but to which he would occasionally throw hay. In addition to that he

spent ninety-eight hours during that period of time in connection with repairs on a barn; forty-four hours repairing fences; fourteen hours plowing potatoes; six hours at lunch; "ten hours off today because of wife's health;" eighteen hours threshing; five hours hunting cattle; 89½ hours consulting with his counsellor, or supervisor on the ranch, the Government representative; 79½ hours studying, or reading and studying literature in connection with farm operations, bulletins from the University, etc.; 59½ hours hauling hay; 76½ hours hauling manure; 84½ hours miscellaneous activities; three hours in connection with building or repairing a poultry house; that in the second period of time, that is, from the latter part of March, 1923 to September 29th, 1923, a period where he reported a total of 1775 hours of activity, 475 hours of the time being devoted to the doing of chores; five hours to hauling hay; 64 hours to hauling manure; 66 hours studying and reading papers and bulletins; 14 hours repairing buildings; 90 hours miscellaneous activities; sixteen hours calling on doctors, medical attention; fifty hours visiting and consulting with the agent or counsellor; 93 hours building and repairing chicken coops; 101 hours plowing and harrowing; 52 hours working on, or taking care of baby chicks; 77 hours repairing fences; fourteen hours drilling beets; 91 hours irrigating; 145 hours in field with beet thinners, and in that connection his labors there were supervisory, he doing none of the thinning; mowing and hauling hay

100 hours during the haying season; 162 hours hoeing beets; 100 hours cutting grain; 44 hours drilling grain; and sixteen hours cleaning weeds from the summer-fallowed land; that during that period of time and in the months of February and March, 1923, he was in the hospital at Boise for approximately two weeks, and that no reports as to activities were made from August 18th to September 22nd.

Doctor, I was referring at the time of the recess to the record of activities during his vocational training, closing with the placement period on the farm, ending on or about September 30th, 1923 and in connection with that, in addition to the reports as to the hours of activity and the nature of that activity, I will add this additional information from the reports: This question is asked and answered by the plaintiff on the report as rendered: "Does your physical condition permit of satisfactory progress in this employment objective?" To twenty-four times that question is asked he answered "Yes," sixteen times,—correct that, twenty-two times, and he makes no answer on the other two reports. The next question, "Are you satisfied with your progress and confident of becoming employable?" His answer to that, out of twenty-four times that the question is asked is affirmatively, yes, sixteen times, twice he fails to answer, and six times he makes approximately this answer, "Not satisfied. Insufficient instruction," and approximately that same language is to all six of these reports. I would also

ask you to assume that beginning with a period at Chateau-Thierry, in addition to the pains in the shoulder, and from that time to the present he has had frequent swelling of his ankles; that during the engagements over there on one occasion he had his buddies killed beside him; on another occasion the entire squad was killed, he being the only one remaining, and the captain ordered him to return to his squad and he found there was no others remaining of those who filled the squad. There were eight in the squad, seven killed, he being the eighth one. That he has followed the instructions of the physicians, and he has taken liquid medicine and pills every since he first started taking pills because of those complaints prescribed to him by the medical officers in the army in France, continued that until he came home, and beginning with the first week in July, 1919, he has continued taking those liquids and pills as prescribed by physicians since that time; that he has undertaken work such as irrigation, plowing, pitching hay, working in the beet fields, other than that which we have submitted to you in the reports from which I read to you this morning, going out into the field, working an hour or two, coming back to the house, resting or lying down, sometimes lying down in the field beside the work because of his pains and suffering; that on several occasions he left the field and left the team standing in the field hitched to the equipment and came to the house and somebody else brought in the team; in addition to the work I have called your atten-

tion to in the reports, he continued the operation of that farm,—or those farms, as I have stated, more or less constantly from 1922 to the present time. I call attention to these exceptions: In 1930, while he continued to reside on the place, he secured employment from a Mr. Fjelsted, his duties involving that of buying grain for which he received \$130.00 a month for approximately two months, and thereafter and because of his inability to be consistently on the job due to these pains and suffering, arrangements were made whereby he received forty cents an hour for the actual hours he continued to work, that continuing thereafter for some three or four months; in another instance he was employed as city marshal of the town of Dayton, and received therefor twenty-five dollars per month as a salary, his duties being to look after the dance hall, watching out for the stealing of gasoline by the boys, and repairing the water pipe lines when they would spring a leak, but because of his pain and suffering, and inability to repair those leaks he was discharged from that employment after approximately four months employment there. On another occasion he went to Salt Lake City, that being in the spring of 1932, and has continued from that time to the present to more or less make his home there with his father-in-law, working at his father-in-law's plant under his brother-in-law's direction, being a wrecking,—a car-wrecking outfit, the employment arrangement being that he may work whenever able to work and be on the job, that there was always

work there for him but he didn't go to work on account of his pain and suffering, and his general inability to work, but that he did work there at occasions at twenty-five cents an hour, which netted him during that period of time earnings of approximately sixty dollars; that that is all of the earnings he has had since that time; that he has testified,—or the record shows that outside of these matters I have called to your attention he has made no earnings by his own effort other than the partial, or the help to the living while on the farm; and you may further assume that the wife in 1923 went on down to Provo, Utah, and secured employment as a school teacher working that year down there, and since that time has been engaged in teaching school for eight seasons, including the one I have just referred to, and that money thus received was their source of livelihood, and their means of living; that in addition to that they received free gifts and help from the brothers of both the wife and the plaintiff, and also help from the father in stocking the ranch without cost to them, and in labor performed on the ranch during haying and other seasons; that on one occasion, in 1922 or, rather, in 1923 one of the brothers came there in about July in order to relieve the hired man they were paying and continued to work until late fall until the crops were up, and without any charge whatever, he and other brothers frequently doing that thereafter; that on certain occasions they received help from other sources, as for instance, on one occasion while the

plaintiff was in the hospital at Boise, the Veterans Hospital, he received \$35.00 from the Veterans Welfare Bureau as a gift, and aid; that throughout the period of time since he came back from the service, on or about May 1st, 1919, he has been on a diet until within the last few months; that he has constantly had poor rest at nights, primarily due to pain and suffering in connection with the process of urination, and the necessity for it; that he has not had a well day since his discharge, that is a day entirely free from the pain and suffering and aches that I have described; that he has not worked continuously through any one day since his discharge other than as listed in the report that I read to you this morning,—based upon those assumed facts, Doctor, coupled with your findings and your diagnosis, and based upon the definition that I have given you, do you have an opinion as to whether or not the plaintiff Glenn Perkins is, or has been, totally and permanently disabled?

THE COURT: Just answer that yes or no, Doctor.

A. Has been disabled, yes.

Q. You do have an opinion?

MR. GRIFFIN: We move that his answer be stricken as not responsive, if the Court please.

THE COURT: Stricken. That calls for a yes or no answer.

A. Yes.

Q. What is that opinion, Doctor?

MR. GRIFFIN: The Government at this time objects to any opinion on the part of this witness for the reasons and upon the grounds: That as our objection as heretofore been made, that he doesn't understand the definition of total and permanent disability, particularly the word "continuously," and on the further ground that any opinion given by this witness as to what occurred in 1918 or 1919 is an invasion of the province of the jury, and he is called upon to render an opinion involving the whole merits of the case.

THE COURT: Objection over-ruled.

Exception.

A. Total and permanent disability.

Q. And how long in your opinion has he been totally and permanently disabled, Doctor?

A. Since he left the service.

Q. And can you fix approximately that date, Doctor?

A. I think it was 1919, wasn't it?

Q. Taking those four disabilities, Doctor, the pyelitis, the cystitis, the arthritis, and the injured foot and hand you speak of, which you found in 1919, on November 10th, and assuming the definition of total disability, that is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, and that such total disability shall be deemed to be permanent whenever it

is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it, and I will ask you whether or not in your opinion,—or first, do you have an opinion as to whether or not Mr. Perkins was totally and permanently disabled because of those disabilities at that time.

MR. GRIFFIN: If your Honor please, for the purpose of an objection, I would like to ask this witness a question.

THE COURT: Very well.

QUESTIONS BY MR. GRIFFIN:

Q. Doctor, what do you understand by a man being able to carry on continuously some substantially gainful occupation?

A. Why, I should think he should be able to put in sufficient time to reasonably carry out the business of his occupation. I think he should be in a position to do that without permanent injury to his health.

Q. Would you say that a man if he worked ninety per cent of the time would be totally disabled?

A. I should think that would depend on what he was doing.

Q. What have you in mind he might be doing? Suppose, Doctor, for instance, a man was a common laborer, if he could work ninety per cent of the time would you say he was totally disabled?

A. Well, the ordinary common laborer, a man that could work ninety per cent of the time would be as good as the average man, I would think.

Q. What would you say about a man that worked eighty per cent of the time?

A. That would be getting close to the margin, I should imagine.

Q. Suppose a man had a position as a watchman, or something like that, if he could work eighty per cent of the time, would you say he was totally disabled?

A. Well, if he had an important watchman's job he would surely have to put in eighty per cent of the time.

Q. If a man was able to do work for seventy-five to eighty per cent of the time in any ordinary physical work would you say he was totally disabled? That is what I am trying to get at.

A. Well, if he was able to do it without injury to his health, I should think that if he could perform seventy-five to eighty per cent of the working hours he was supposed to be on the job, that ought to be fairly reasonable. A man is likely to get sick, you know, and have to spend a few days off, even if he is in good health ordinarily.

Q. You say then that if a man could work seventy-five to eighty per cent of the time under this definition, he would be able to work continuously?

A. Providing there was no injury to his health.

MR. GRIFFIN: That is all.

DIRECT EXAMINATION RESUMED:

MR. LAMPERT: Will you read the question, please, Mr. Reporter?

(Question read by the Reporter.)

A. Yes, sir.

Q. (By Mr. Lampert;) What is that opinion, Doctor?

MR. GRIFFIN: We object to his giving any opinion, if the Court please, on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact to be decided by the Court and jury.

THE COURT: Objection over-ruled.

MR. GRIFFIN: An exception, please.

A. My opinion is that the man is and has been totally disabled from the time I saw him first, and that he will be totally disabled as long as he lives.

Q. Now, Doctor, you were present in Court when the hypothetical question was propounded, and heard the facts as there related, or the assumed facts?

A. Yes, sir.

Q. I will ask you to assume those facts, in addition to your own findings and diagnosis, and ask you to state based upon the opinion which you have heretofore given,

—or the interpretation as to permanent and total disability, whether or not you have an opinion as to any total and permanent disability existing in connection with Glenn Perkins at a time prior to your examination?

A. Yes, I believe I have.

Q. And what is that opinion, Doctor?

MR. GRIFFIN: If the Court please, we object to the witness giving that opinion on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact in issue here.

THE COURT: Objection over-ruled. He may answer.

MR. GRIFFIN: An exception, please.

A. My opinion is that he was disabled,—totally and permanently disabled for at least six months prior to the time I saw him.

(Service acknowledged)

(Title of Court and Cause.)

STIPULATION FOR SETTLEMENT OF BILL

It is hereby stipulated and agreed by and between the respective parties hereto as follows:

a. That the appellant waives its assignments of errors numbered I., II., III., VII., VIII. and IX.

b. That the appellee confesses error in respect of assignments of errors numbered IV., V., VI., and X., and consents that the judgment entered herein in the court below may be reversed and that the cause may be remanded for retrial pursuant to law and the practice of the appellate court.

c. That the cause may be reversed and remanded without notice to either party and without the appearance of either party either by brief or in person.

d. That the foregoing Bill of Exceptions has been examined by the respective parties hereto and contains all of the evidence adduced at the trial of this cause as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved and which are presented by the assignment of errors herein and all of the evidence presented to the jury bearing upon the questions involved in the assignment of errors, and that the same may be settled as defendant's bill of exception and that the judge of this court may sign the hereto attached certificate settling the said bill of exception.

DATED April 2, 1935.

J. M. LAMPERT,
B. W. OPPENHEIM,
J. B. MUSSER,

Attorneys for Plaintiff.

J. A. CARVER,
E. H. CASTERLIN,

Attorneys for Defendant.

(Title of Court and Cause.)

CERTIFICATE OF JUDGE TO BILL
OF EXCEPTIONS

I, CHARLES C. CAVANAH, United States District Judge for the District of Idaho, and the Judge before whom the above entitled action was tried, to-wit, the cause entitled Glenn Perkins, plaintiff, v. United States of America, defendant, which is No. 851 of the Eastern Division of said District Court,

DO HEREBY CERTIFY that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in the trial of said cause and the same are hereby made a part of the record herein; that the above and foregoing Bill of Exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record herein, which are necessary to present clearly the questions of law involved in the rulings to which exceptions are taken and reserved and presented by the assignment of errors, and which are all of the evidence presented to the jury bearing upon the questions involved in the assignment of errors, and is a true Bill of Exceptions as to said questions of law; that the above and foregoing Bill of Exceptions was duly and regularly filed with the Clerk of this Court and thereafter duly and

regularly served, settled and filed herein within the time allowed by law and the rules of this Court; that no amendments were proposed to said Bill of Exceptions excepting the same are embodied therein; that due and regular notice of the time of settlement and certifying said Bill of Exceptions was given and that the same was settled and certified during the trial term as extended for that purpose.

DATED at Boise, Idaho, this 2nd day of April, A. D., 1935.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

PETITION FOR APPEAL

Filed January 16, 1935

Comes now the above-named defendant, United States of America, and says that on or about the 24th day of October, 1934, this court entered judgment upon verdict of the jury in the trial of the above entitled cause against said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which errors will appear more in detail from the assignment of errors, which is filed with this petition.

And the petitioner further says that said cause was brought against said defendant under Title 38, Section 445, U.S.C.A.; that this appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice, and the said defendant in petition herein is acting under the direction aforesaid, and no bond for costs, supersedeas or otherwise ought, pursuant to Sections 869, 870, Title 28, United States Code, be taken or required.

WHEREFORE, the said defendant prays that an appeal be allowed in its behalf in the United States Circuit Court of Appeals for the Ninth Circuit of the United States for the correction of the errors so complained of; that said allowance operate as a supersedeas and no bond therefor or for costs or otherwise be required and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that citation issue as provided by law.

J. A. CARVER,

United States Attorney
for the District of Idaho.

E. H. CASTERLIN,

Assistant United States Attorney
for the District of Idaho.

FRANK GRIFFIN,

Assistant United States Attorney
for the District of Idaho.

A. L. FREEHAFER,

Attorney, Department of Justice.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

Filed January 16, 1935

Comes now the defendant in the above entitled cause and files the assignment of errors upon which it will rely upon the prosecution in the appeal for the above entitled cause, from the judgment made by this Honorable Court on the 24th day of October, 1934.

I.

The Court erred in overruling defendant's objection to the following question propounded to Dr. Curtis Bland, a witness for the plaintiff, to-wit:

"Q. You may state your opinion as to whether the plaintiff will ever be able to follow any substantially gainful occupation with sufficient continuity to enable him to make a reasonable living.

MR. GRIFFIN: We object on the ground it hasn't been shown that this doctor is qualified to answer a question as to whether or not a person can follow any substantially gainful occupation, no occupations have been called to his attention. It is a question which can be answered by a lay man as well as by an expert, and we object to his answering the question on that ground.

THE COURT: Objection overruled."

Exception.

“A. I do not believe he will be able to do that.”

II.

The Court erred in overruling defendant's objection to the following question propounded to Dr. Curtis Bland, a witness for the plaintiff, to-wit:

“Q. Assume, Doctor, that total disability means that condition of mind or body which renders it impossible for a disabled person to follow continuously a substantially gainful occupation, and assume that total disability shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it, state your opinion as to whether or not the plaintiff, Glenn Perkins, at the time you last observed and treated him, was suffering from permanent total disability.

MR. GRIFFIN: We object to that at this time, if your Honor please, upon the ground it calls for an opinion on the ultimate fact to be decided by the jury, and that is an invasion of the province of the jury.

THE COURT: Objection overruled.

MR. GRIFFIN: An exception, please.

A. He was.”

III.

The Court erred in overruling defendant's objection to

the testimony of Dr. Ellis Kackley, a witness testifying on behalf of the plaintiff, to-wit:

“MR. GRIFFIN: If your Honor please, at this time we would like to question the witness as to his qualifications to answer that question.

THE COURT: Very well.

QUESTIONS BY MR. GRIFFIN:

Q. Doctor, you just heard the definition of total disability, do you recall that?

A. Yes, sir.

Q. What total disability is?

A. Yes, sir.

Q. You also heard when total disability becomes permanent,—you remember that?

A. Yes, sir.

Q. Now it says that total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain it shall continue throughout the life of the party suffering from it, and total disability is when you cannot carry on continuously any substantially gainful occupation. Now, what do you understand “continuously,” to mean?

A. Daily.

Q. That means going on day after day, is that it?

A. Yes, sir; going on day after day.

Q. And if a man was a farmer in your opinion under that definition it would be necessary for him to work from six o'clock in the morning until eight o'clock at night?

A. He has to, if he can make a living on a farm.

Q. Is that your idea of continuous?

A. Yes, sir; I was raised on one.

Q. That is your idea of continuous?

A. Yes, sir.

MR. GRIFFIN: Now, if the Court please, we object to the doctor giving any opinion at this time for the reason that his idea of continuously under the definition upon which law suit is based is erroneous, and improper, and not according to what the word continuously means under that definition.

THE COURT: Wouldn't it be a question going to the weight of the evidence, when he says he understands continuously to mean day after day as applied to a man following the vocation of a farmer, from six o'clock in the morning until eight at night.

MR. GRIFFIN: He said he would have to work all day. He said he knew all about it. He said his idea of continuously would be that he would have to work all the time.

MR. LAMPERT: I dislike to interrupt, but he added the words, "to make a living."

THE COURT: It is somewhat difficult to ask the Court to pronounce a definition of what continuous

work on a farm is. There is nothing here except this witness' statement. You are asking me to give a definition of what continuous work on a farm is, that is, as to the number of hours that such work would have to be performed to be continuous. I don't think any court on earth can attempt to give a definition on that. We have to leave that to the weight of the evidence.

Men may differ on that, some may say we work continuously on a farm if you work six hours, some may say eight hours, and some twelve. They may have different ideas. For the Court to lay down arbitrarily a rule as to the number of hours of work on a farm that would constitute continuous,—I think that is a matter of the weight of the evidence. So far we have nothing in this case as to what would constitute continuous work on a farm, except a statement of the witness here. He fixes the hours, I think, between six in the morning and eight at night.

MR. GRIFFIN: May I ask a question or two more, if your Honor please?

THE COURT: Yes.

Q. (By Mr. Griffin:) Doctor, in any other line of occupation, taking waiting on table, or anything you could think of where a person is supposed to work eight or ten hours a day, suppose they were

only,—suppose they missed an hour a day, would you say they couldn't work continuously?

A. If he missed an hour, that wouldn't be very much.

Q. Would that be continuously,—would he be working continuously under your idea of the definition?

A. They couldn't be working continuously if they lost an hour.

Q. It would be necessary for them to work all the time? If a man was employed to work eight hours a day, under your idea of this definition he would have to work eight hours, is that it?

A. That would be my idea. If he were employed to work eight hours, then he would have to do that to fulfil his part of the contract.

MR. GRIFFIN: Now, if the Court please, the Courts have all held, so far as I have been able to find, that continuously means with reasonable regularity, and in the Hansen case they held it to be continuously if he worked seventy-five per cent of the time, that he worked continuously within the meaning of the definition. This doctor says here that a man has to work all the time, so far as he knows, in order to be working continuously under the definition which forms a basis of what is before the Court at this time.

MR. LAMPERT: If your Honor please, he is limiting it strictly to the word "continuously" without the balance of the definition, at a substantially gainful occupation, and he is taking an isolated case of what might be continuous in connection with a man working who is hired for eight hours a day, and he is asked whether or not if he lost one hour, if that would be continuous. He said no. That is quite a different thing from this definition which provides he shall work continuously at a substantially gainful occupation. The question is whether that combination is understood by the Doctor.

THE COURT: If we are going into the question of mathematics as to the number of hours each day that one must be able to work to constitute continuously, I am afraid we are going to get into a difficult situation, although I think in the Hansen case the Appellate Court held that where one was employed seventy-five per cent of the time from the period of discharge until the time the action was brought and worked from one-third to fifty per cent of the time that he wasn't totally disabled. That is what they held in that case. It is not strictly confined to the period in which he was employed; it is confined to the time he was able physically to function, as all we are determining is, what was the man's physical condition, physical ability. One may be employed and he may work ten hours a day, and

drops out, and doesn't actually put in that ten hours day after day, but he drops out often. The fact that he may be up ten hours a day to my mind is not the criterion in determining his physical ability, under the disability we are considering, but we have that mathematical determination in the Hansen case, and I am having difficulty in following it, in applying it to every case. The Courts are getting down to a mathematical situation, as they held in that Hansen case, and the Supreme Court denied certiorari in that case, as I recall it, just recently, and said that was the final opinion, and that is what we have in this Circuit. They denied certiorari the other day, as I read it in the newspaper.

MR. LAMPERT: That is correct.

THE COURT: We can't lay down the hard and fast rule as to the hours necessary to work during a day and apply it to all the occupations or vocations. Some are different. In determining what is reasonable regularity, I might say a bookkeeper worked with reasonable regularity if he worked six hours a day. We may go on a farm, and some one might say it takes longer; so you are putting up to the Court a question of fact, that to my mind has to be determined from the particular facts in order to accurately determine what is working with reasonable regularity. Now, the doctor's view here is that reasonable regularity means that he must work from

six in the morning to eight o'clock at night on a farm, to work with reasonable regularity. That is a question of the weight of the evidence. I will overrule the objection. I think you are getting the Court into deep water when you ask me to define that distinction between the different vocations. After all, it is a question of fact to be determined as to the particular occupation and vocation in each particular case. That is the only way I can get right to the bottom of things, not any arbitrary mathematical cut-off in any case. I can't reason that way. The objection will be overruled."

Exception.

A. That he was totally and permanently disabled.

IV.

The Court erred in overruling defendant's objection to the hypothetical question propounded to Dr. Ellis Kackley, a witness for the plaintiff, as follows:

"MR. LAMPERT: I will ask you, Doctor Cutler, to step forward, as I am about to present the hypothetical question. I would like to have you be seated inside the railing there where you can hear this question. It is the Court's desire, and it is the practice, that we propound the hypothetical question to the witness and to the other physicians at the same time to avoid repetition.

Q. Doctor, in addition to your findings and diagnosis, and the definition for total and permanent disability which I have given you, I will ask you to assume these facts, and wipe out from your mind any other facts than those I am now presenting to you in this assumed question,—I mean by that, other than your own findings and diagnosis: That this plaintiff had an education of two years in the high school,—was in his second year when stopping his education; that he was a farmer through training and occupation throughout life, had no other avocation or training other than that after the war, and that from about January 15th, 1921, to September, 1923, he was under instructions from the University of Idaho at Moscow for the period from January 15th, 1921 to about March 1st, 1921, in the forestry work, and from that period on to about September 1923 under training for agricultural pursuits on placement training, placed upon a ranch where he worked under supervision from about March 1st, 1922, to approximately September, 1923,—

MR. FREEHAFER: September 30th is the exact date.

MR. LAMPERT: If you will kindly insert there, Mr. Reporter, “to September 30th, 1923.”

Q. —that he entered the military service on the ninth of August, 1917, entered the Marine Corps,

and served therein that service until he was honorably discharged on the 20th day of June, 1919, save and except that on November 1st, 1918, he received wounds while engaged in battle in the Argonne, as a result of which he was taken first to the field hospital, then the Red Cross Hospital, and then the Base Hospital, finally on to Brest, and transferred to the United States as a casual in March to Quantico, Virginia, and continuing as a casual he was finally sent back home on a furlough, arriving at his home near Pocatello, Idaho, on or about May 1st, 1919, remaining there until the formal discharge was issued to him at Salt Lake City on June 20th, 1919; that during this period of his military service he arrived in France on or about March 5th, 1918, and within three weeks began engagements in active warfare, continuing for about a week, and then was in training, finally landing in the permanent active front line warfare on or about June 1st, 1918, being at the Chateau-Thierry, Soissons, Toul, Champagne, and Argonne sectors; that during that time he inhaled gas, one time to the extent that he was caused to vomit, and vomited in the gas mask; that he received burns, gas burning in several of these engagements, and that these body burns continued with him to the present time, and have throughout the years; that the inhaling of the gas caused burning sensations in his

throat; that he was forty-six days under what he termed constant battle line work on one occasion, although he would have hours of rest at times, digging in to holes in the trenches, that he had during that period of time gone as long as,—well, he only had one change of clothes during that period of time, his clothes being wet much of the time, he being in water, standing in water much of the time; that during that period from about the first of June to the first of November, 1918, he was under much heavy shell fire, and a major portion of the time he was irregular with his meals, many days only receiving one meal; that on occasions he was without water for a considerable period of time, so that he became thirsty enough to on one occasion, at least,—yes, on two occasions to drink warm water from the cooling system of the German machine guns as they marched on into the German territory; that during the Chateau-Thierry engagement he was struck on the head with a flying object and became unconscious; that the injury I referred to as occurring on November 1st, 1918, was a shrapnel wound in the left foot, also in the left hand and left leg. He was not treated at the time for the left leg wound other than his own attention; the left hand wound was treated by a German prisoner on the way back to the hospital, and later treated in the hospital; the left foot was not given treatment

at the time although it was sore and swollen from the injury, and its first treatment was by a Doctor Sprague in Pocatello on or about January, 1920, who then operated upon it; that the gas burns or sores are the most noticeable on the chest, legs, face and neck; that while at the San Mihiel front, which was in September in 1918 he first had a lame, sore back, which has continued from that time until the present; that again in October at the Champagne front while urinating he experienced a hurting and burning sensation; that he found his urine was bloody, of a bloody color, and that hurting and burning sensation and the bloody color continued for a couple of days; that again in the base hospital,—after November 1st, 1918, when he was taken back to the base hospital he was bothered in the same way, and had the same pains and suffering and the lame back and hips, and the smarting and burning while urinating, and that these pains and this suffering has continued to date, not to the same degree of severity each and every day but constantly with him in some degree; that the urine was some times thick, not always bloody; that during the period of that warfare while wet and cold he had dull pains and aches and his arms became stiff, and that he still has dull pains and aches in his arms and shoulders, and that after he came to his home, within two or three days after his arrival, his mother's at-

tention being attracted by his complaint of pains in the back, she applied mustard plasters; that from that time to the present he has had frequent applications of mustard plasters, rubbing with turpentine, and massaging on his back by his mother, brother, or wife; that that has not been daily, but very frequently throughout the period of time, and that he also in 1919 upon the recommendation of a doctor at Preston he had and made use of what he termed a Johnson & Johnson kidney plaster, and they have been applied constantly from that time to this; that after he arrived home he had a yellow complexion, was thin, sunken cheeks, moved slowly, was nervous, would lie down and get up and move around in conversation; that in the month of June, 1919, he had what he termed a bad spell lasting for a couple of hours, having severe pains in the back, and in connection with the passage of urine; that during this period it was observed that he was bothered at night with getting up frequently and urinating, and that his urine was bloody and was stringy and pus-like, and this condition continued frequently from that time to the present; that the first week of July, 1919, he was given treatment for pyelitis, cystitis and neurasthenia by a medical official of this state who at that time found him under-weight, anaemic, tired, and exhausted, that he would get up in the morning still tired, suf-

ferred from a kidney difficulty and pain in the back and tenderness and pain extending into the groin, an irritability of the bladder and frequent urination, and more or less discomfort at the time of urinating; that this pain, appearance, condition, pains and suffering that I have related as occurring on these occasions have continued throughout to the present time; that he has been treated, examined and given treatment by Doctor Bland, Doctor Cutler, Doctor States, Doctor Kackley, Doctor Sprague, Doctor Milford, of his own choosing, and in addition thereto has made trips to the Veterans Hospital at Boise, where he has been under examination in 1923, 1924, 1926, in 1929, 1930 and 1932; that in addition to that while at the University he received treatment by a Government doctor and for the same ailments, pain and suffering; that while there he was also sent for examination to a representative of the Government, a physician for the Veterans Bureau, or Public Health Service, in Spokane, that being in 1921, both of those instances; that on his arrival home he did no work during the months of May, June and July, remaining at his father's and mother's home near Pocatello; that following that he had approximately two months employment with the Forestry Department, receiving for his services there four dollars per day, that working consisting first of two weeks waiting orders at Hailey, Idaho,

and then the balance of the time as an assistant on a truck in connection with fire-fighting service up in the Salmon River country; that he came back from that service about October 1st, 1919, and then again remained around his home without any work, other than occasionally going over to the dairy herd,—dairy farm his father was operating, and at times aiding in the milking and the chores, that continuing until about January 15th, 1921; that thereafter he attended the University under the training I have heretofore referred to for forestry work, and later in placement training from February, 1921,—February, 1922 until about September, 1923, during which time he in addition to the studies at the University, which consisted of going to the University at about nine o'clock in the morning, remaining some days until twelve, other days maybe one hour or two hours in the afternoon, never more than three hours in the afternoon, and that he missed a few days in addition to those afternoons that I have referred to, otherwise taking quite regularly that course; that after he came back to the placement training,—that was upon the farm adjacent to the town of Dayton, where he had in connection with his operations two farms, one consisting of approximately eighty-four acres, which was in his name and owned by him, subject to a mortgage, which he had acquired before the war, and which

he lost by reason of the mortgage foreclosure on or about 1925 in the month of June, and in addition to that he had there two hundred and sixty acres, approximately, consisting of about fifteen acres of irrigated land, the balance dry farm, mostly in wheat, some in pasture; that during the time that he was there upon that farm and between the months of November, 1922, and September, 1923, he made reports as to his activities there, which include among other things the following: That he reported as to a total of 1158 hours up to March 24th, 1923, that being the winter season covering the first winter of 1922-1923, out of which time 570½ hours were devoted to doing chores, the chores consisting of milking from three to five cows daily, taking care of the stables, one team of horses, five young pigs, and nine chickens; that in addition to that he occasionally fed some other stock which was running out on the range, but to which he would occasionally throw hay. In addition to that he spent ninety-eight hours during that period of time in connection with repairs on a bar; forty-four hours repairing fences; fourteen hours plowing potatoes; six hours at lunch; "ten hours off today because of wife's health;" eighteen hours threshing; five hours hunting cattle; 89½ hours consulting with his counsellor, or supervisor on the ranch, the Government representative; 79½ hours studying, or read-

ing and studying literature in connection with farm operations, bulletins from the University, etc.; 59½ hours hauling hay; 76½ hours hauling manure; 84½ hours miscellaneous activities; three hours in connection with building or repairing a poultry house; that in the second period of time, that is, from the latter part of March, 1923, to September 29th, 1923, a period where he reported a total of 1775 hours of activity, 475 hours of the time being devoted to the doing of chores; five hours to hauling hay; 64 hours to hauling manure; 66 hours studying and reading papers and bulletins; 14 hours repairing buildings; 90 hours miscellaneous activities; sixteen hours calling on doctors, medical attention; fifty hours visiting and consulting with the agent or counsellor; 93 hours building and repairing chicken coops; 101 hours plowing and harrowing; 52 hours working on, or taking care of baby chicks; 77 hours repairing fences; fourteen hours drilling beets; 91 hours irrigating; 145 hours in field with beet thinners, and in that connection his labors there were supervisory, he doing none of the thinning; mowing and hauling hay 100 hours during the haying season; 162 hours hoeing beets; 100 hours cutting grain; 44 hours drilling grain; and sixteen hours cleaning weeds from the summer-fallowed land; that during that period of time and in the month of February and March 1923 he was in the

hospital at Boise for approximately two weeks, and that no reports as to activities were made from August 18th to September 22nd,—

THE COURT: We will suspend at this time. It is twelve o'clock. We will recess until one thirty, gentlemen;

12:00 Noon

1:30 P. M.

October 20th, 1934.

THE COURT: You may proceed.

MR. LAMPERT: Shall I continue, your Honor?

THE COURT: Yes.

Q. (Continued:) Doctor, I was referring at the time of the recess to the record of activities during his vocational training, closing with the placement period on the farm, ending on or about September 30th, 1923, and in connection with that, in addition to the reports as to the hours of activity and the nature of that activity I will add this additional information from the reports: This question is asked and answered by the plaintiff on the report as rendered, "Does your physical condition permit of satisfactory progress in this employment objective?" to twenty-

four times that question is asked he answered "Yes," sixteen times,—correct that, twenty-two times, and he makes no answer on the other two reports. The next question, "Are you satisfied with your progress and confident of becoming employable?" His answer to that, out of twenty-four times that the question is asked is affirmatively, yes, sixteen times, twice he fails to answer, and six times he makes approximately this answer, "Not satisfied. Insufficient instruction," and approximately that same language as to all six of those reports. I would also ask you to assume that beginning with a period at Chateau-Thierry, in addition to the pains in the shoulder, and from that time to the present he has had frequent swelling of his ankles; that during the engagements over there on one occasion he had his buddies killed beside him; on another occasion the entire squad was killed, he being the only one remaining, and the captain ordered him to return to his squad and he found there was no others remaining of those who filled the squad,—

MR. GRIFFIN: There was seven in number in the squad.

MR. LAMPERT: Eight; seven killed, he being the eighth one.

Q. —that he has followed the instructions of the physicians, and he has taken liquid medicine and

pills ever since he first started taking pills because of those complaints prescribed to him by the medical officers in the army in France, continued that until he came home, and beginning with the first week in July, 1919, he has continued taking those liquids and pills as prescribed by physicians since that time; that he has undertaken work such as irrigation, plowing, pitching hay, working in the beet fields, other than that which we have submitted to you in the reports from which I read to you this morning, going out into the field, working an hour or two, coming back to the house, resting or lying down, sometimes lying down in the field beside the work because of his pains and suffering; that on several occasions he left the field and left the team standing in the field hitched to the equipment and came to the house and somebody else brought in the team; in addition to the work I have called your attention to in the reports, he continued the operation of that farm,—or those farms, as I have stated, more or less constantly from 1922 to the present time. I call attention to these exceptions: In 1930, while he continued to reside on the place, he secured employment from a Mr. Fjelsted, his duties involving that of buying grain for which he received \$130.00 a month for approximately two months, and thereafter and because of his inability to be consistently on the job due to these pains and

suffering, arrangements were made whereby he received forty cents an hour for the actual hours he continued to work, that continuing thereafter for some three or four months; in another instance he was employed as city marshal of the town of Dayton, and received therefor twenty-five dollars per month as a salary, his duties being to look after the dance hall, watching out for the stealing of gasoline by the boys, and repairing the water pipe lines when they would spring a leak, but because of his pain and suffering, and inability to repair those leaks he was discharged from that employment after approximately four months employment there. On another occasion he went down to Salt Lake City, that being in the spring of 1932, and has continued from that time to the present to more or less make his home there with his father-in-law, working at his father-in-law's plant under his brother-in-law's direction, being a wrecking,—a car-wrecking outfit, the employment arrangement being that he may work whenever able to work and be on the job, that there was always work there for him but he didn't go to work on account of his pain and suffering, and his general inability to work, but that he did work there at occasions at twenty-five cents an hour, which netted him during that period of time earnings of approximately sixty dollars; that that is all of the earnings he has had since that time; that

he has testified,—or the record shows that outside of these matters I have called to your attention he has made no earnings by his own effort other than the partial, or the help to the living while on the farm; and you may further assume that the wife in 1923 went on down to Provo, Utah, and secured employment as a school teacher working that year down there, and since that time has been engaged in teaching school for eight seasons, including the one I have just referred to, and that money thus received was their source of livelihood, and their means of living; that in addition to that they received free gifts and help from the brothers of both the wife and the plaintiff, and also help from the father in stocking the ranch without cost to them, and in labor performed on the ranch during haying and other seasons; that on one occasion, in 1922, or, rather, in 1923 one of the brothers came there in about July in order to relieve the hired man they were paying and continued to work until late fall until the crops were up, and without any charge whatever, he and other brothers frequently doing that thereafter; that on certain occasions they received help from other sources, as for instance, on one occasion while the plaintiff was in the hospital at Boise, the Veterans Hospital, he received \$35.00 from the Veterans Welfare Bureau as a gift, and aid; that throughout the period of time since he

came back from the service, on or about May 1st, 1919, he has been on a diet until within the last few months; that he has constantly had poor rest at nights, primarily due to pain and suffering in connection with the process of urination, and the necessity for it; that he has not had a well day since his discharge, that is, a day entirely free from the pain and suffering and aches that I have described; that he has not worked continuously through any one day since his discharge other than as listed in the report that I read to you this morning,—based upon those assumed facts, Doctor, coupled with your findings and your diagnosis, and based upon the definition that I have given you, do you have an opinion as to whether or not the plaintiff Glenn Perkins is, or has been, totally and permanently disabled?

THE COURT: Just answer that yes or no, Doctor.

A. Has been disabled, yes.

Q. You do have an opinion?

MR. GRIFFIN: We move that his answer be stricken as not responsive, if the Court please.

THE COURT: Stricken. That calls for a yes or no answer.

A. Yes.

Q. What is that opinion, Doctor?

MR. GRIFFIN: The Government at this time objects to any opinion on the part of this witness for the reasons and upon the grounds: That as our objection as heretofore been made, that he doesn't understand the definition of total and permanent disability, particularly the word "continuously", and on the further ground that any opinion given by this witness as to what occurred in 1918 or 1919 is an invasion of the province of the jury, and he is called upon to render an opinion involving the whole merits of the case.

THE COURT: Objection overruled.

Exception.

A. Total and permanent disability.

V.

The Court erred in overruling defendant's objection to the question propounded to Dr. A. R. Cutler, a witness testifying on behalf of the plaintiff, to-wit:

"Q. Taking those four disabilities, Doctor, the pyelitis, the cystitis, the arthritis, and the injured foot and hand you speak of, which you found in 1919, on November 10th, and assuming the definition of total disability, that it is that condition of mind or body which renders it impossible for the disabled person to follow continuously any substan-

tially gainful occupation, and that such total disability shall be deemed to be permanent whenever it is founded upon conditions which make it reasonably certain that it will continue throughout the life of the person suffering from it, and I will ask you whether or not in your opinion,—or first, do you have an opinion as to whether or not Mr. Perkins was totally and permanently disabled because of those disabilities at that time.”

“MR. GRIFFIN: We object to his giving any opinion, if the Court please, on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact to be decided by the Court and jury.

THE COURT: Objection overruled.

MR. GRIFFIN: An exception, please.

A. My opinion is that the man is and has been totally disabled from the time I saw him first, and that he will be totally disabled as long as he lives.”

VI.

The Court erred in overruling defendant’s objection to the question propounded to Dr. A. R. Cutler, a witness testifying on behalf of the plaintiff, to-wit:

“Q. I will ask you to assume those facts, in addition to your own findings and diagnosis, and ask

you to state, based upon the opinion which you have heretofore given,—or the interpretation as to permanent and total disability, whether or not you have an opinion as to any total and permanent disability existing in connection with Glenn Perkins at a time prior to your examination?

A. Yes, I believe I have.

Q. And what is that opinion, Doctor?

MR. GRIFFIN: If the Court please, we object to the witness giving that opinion on the ground it invades the province of the jury, and calls for an opinion on the ultimate fact in issue here.

THE COURT: Objection overruled. He may answer.

MR. GRIFFIN: An exception, please.

A. My opinion is that he was disabled,—totally and permanently disabled for at least six months prior to the time I saw him.”

VII.

The Court erred in overruling defendant's motion, which was as follows, to-wit:

“MR. GRIFFIN: Your Honor will recall that early in this case the question was brought up with reference to a disagreement signed, not by the director of insurance but by a regional manager, and

your Honor deferred ruling on that question until the end of the trial; and the defendant now moves that the case be dismissed for the reason and upon the ground that the Court has no jurisdiction for the reason that the claim denied as to this plaintiff was not denied by the director of war risk insurance Bureau, or someone acting in his name on an appeal to the Director, as required by Title 38, Section 445, United States Codes, Annotated.

MR. LAMPERT: May it be understood as having been agreed upon before starting the case that that is the identical matter ruled on by the Court in the previous matter,—that the same legal question would be raised?”

“THE COURT: The regulation passed by the director designating the local director to act in his person to pass upon the denial, if any, of these claims? That is this record, as I understand it?”

“THE COURT: Very well. The motion will be denied. I am not yet ready to reverse myself in my ruling.

MR. GRIFFIN: The record will show an exception?”

THE COURT: Yes.”

VIII.

The Court erred in overruling defendant's motion for

a directed verdict, which was as follows, to-wit:

“MR. GRIFFIN: If your Honor please, comes now the defendant, the plaintiff and the defendant having both rested, and moves the Court to direct a verdict in favor of the defendant and against the plaintiff for the reason and upon the ground that the evidence of the plaintiff is insufficient to show that he became totally and permanently disabled at a time when his war risk insurance policy was in full force and effect, or that he became permanently and totally disabled at all;

That the evidence affirmatively shows that he worked for a considerable period of time, and that he went to school at the University of Idaho, lost very little time while he was there; then he went down to his farm and the uncontradicted evidence here, the written testimony or evidence tends to show that he worked for thirteen and fourteen hours a day, and carried on the occupation there of a farmer all during that period of time.

The medical testimony in this case, so far as the plaintiff is concerned, is very unsatisfactory, Doctor Kackley frankly admitting that he could not have told in 1919 that this plaintiff was totally and permanently disabled. The other doctor they called stated that he in his opinion, in the first instance when he first examined him back in 1919, that his

opinion at that time was that he was not totally and permanently disabled.

Now, under this definition, and I think we have cases to support it, and these cases have been called to your Honor's attention before, that it is necessary in this kind of a suit to show that while the premiums have been kept up, that at that time there is reasonable grounds to believe that the plaintiff was totally and permanently disabled, and not taking any subsequent event, any events and matters that occurred after the lapse of the policy into consideration.

Now, the plaintiff signed his discharge when he left the army stating frankly there was nothing wrong with him. He hasn't denied that in this case, as they ordinarily do, in other cases. A doctor examined him at that time and found there was nothing wrong with him. Now, in this case it is necessary to have one of those long-ranged retroactive diagnoses in order to support the plaintiff's claim in this case, because there was no diagnosis in his service record of any kidney trouble or bladder trouble. That the only thing we have to base that on is the statements made by the lay witnesses and by the plaintiff himself that he had some pain in his back, and that he was exposed to rain and cold during the time that he was in France, but we don't have any medical testimony as to that until

Doctor Bland about 1919, I think, and I believe he says that these different ailments are curable, and he also says in his deposition that Mr. Perkins worked on his farm during that time, and we submit, if your Honor please, under the evidence here that the defendant is entitled to a verdict.

THE COURT: The motion will be denied.

MR. GRIFFIN: An exception, if the Court please.

THE COURT: Yes."

IX.

That the evidence is insufficient to show or to prove that the plaintiff became totally and permanently disabled while his policy of war risk insurance was in full force and effect, or at all.

X.

That the verdict and judgment are contrary to law.

J. A. CARVER,

United States Attorney for the District of Idaho.

E. H. CASTERLIN

Assistant U. S. Attorney
for the District of Idaho.

FRANK GRIFFIN,

Assistant U. S. Attorney for the District of Idaho.

A. L. FREEHAFER,

Attorney for the Department of Justice.

Attorneys for the defendant.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL

Filed Jan. 16, 1935.

Upon the petition for appeal, accompanied by Assignment of Errors, heretofore filed herein, it being made to appear that said Petition should be allowed and that appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice,

IT IS ORDERED that said petition for appeal be and hereby is granted and an appeal allowed.

DATED this 16th day of January, A. D. 1935.

CHARLES C. CAVANAH,
DISTRICT JUDGE.

(Title of Court and Cause.)

CITATION ON APPEAL

Filed Jan. 16, 1935.

THE PRESIDENT OF THE UNITED STATES TO
GLENN PERKINS and to Oppenheim & Lampert
and J. B. Musser, his Attorneys, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California within thirty days from the date hereof pursuant to Order Allowing Appeal regularly issued, and which is on file in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, in action pending in said court wherein the United States of America is appellant and Glenn Perkins is appellee, and to show cause, if any there be, why the judgment and proceedings in said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 16th day of January, A. D. 1935.

CHARLES C. CAVANAH,
U. S. DISTRICT JUDGE.

ATTEST:

W. D. McREYNOLDS, *Clerk*.
(Seal)

District Judge.

(Title of Court and Cause.)

PRAECIPE FOR
TRANSCRIPT OF RECORD

Filed Jan. 16, 1935.

To the Clerk of the Above-Entitled Court:

Please prepare, certify, print, return and transmit to the Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, transcript of record in the above entitled cause, including therein

1. Complaint.
- 1½. Answer and Amendment thereto.
2. Court Minutes.
3. Verdict of Jury.
4. Judgment.
5. Bill of Exceptions.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
9. Citation on Appeal.
10. Praecipe for Transcript of Record.
11. Acceptance of Service of Assignment of Errors, Petition for Appeal, Order Allowing Appeal, Praecipe for Transcript of Record, and Citation on Appeal.

12. Minutes or stipulation and order concerning and settling Bill of Exceptions.

showing in each case fact and date of filing and acceptance of service. Omit printing of title, court and cause and verification.

J. A. CARVER,
United States Attorney
for the District of Idaho.

E. H. CASTERLIN,
Assistant United States Attorney
for the District of Idaho.

FRANK GRIFFIN,
Assistant United States Attorney
for the District of Idaho.

A. L. FREEHAFFER,
Attorney, Department of Justice.

(Title of Court and Cause.)

ACCEPTANCE OF SERVICE

Filed Jan. 17, 1935.

Service of

ASSIGNMENT OF ERRORS,
PETITION FOR APPEAL,
ORDER ALLOWING APPEAL,

PRAECIPE FOR TRANSCRIPT OF RECORD,
CITATION ON APPEAL,

is hereby accepted and receipt of copies thereof acknowledged this 17th day of January, A. D. 1935.

OPPENHEIM & LAMPERT,

J. B. MUSSER,

Attorneys for plaintiff.

(Title of Court and Cause.)

CERTIFICATE OF CLERK

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 83, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of \$108.40 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 16th day of April, 1935.

(SEAL)

W. D. McREYNOLDS, Clerk.

